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Supreme Court of the United States

OCTOBER TERM, 1953

No. 44

AVONDALE MARINE WAYS, INC.,
Petitioner,

against

JOSEPH H. HENDERSON, Deputy Commissioner, MRS. VIOLA CAMPBELL, VELMAR LEE CAMPBELL, et al.,
Respondents.

BRIEF ON BEHALF OF PETITIONER ON WRIT OF CERTIORARI

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BRIEF ON BEHALF OF PETITIONER ON WRIT OF CERTIORARI

This is a review, on writ of certiorari, of a decision of the United States Court of Appeals for the 5th Circuit holding that an accident to two employees of the petitioner on a marine railway on dry land was within the jurisdiction of the Longshoremen's and Harbor Workers' Compensation Act rather than the Louisiana Workmen's Compensation Act (R. 87-9). The matter involves only questions of law.

I.

The opinions of the courts below.

Two awards were made by the respondent Deputy Commissioner under the Longshoremen's and Harbor Workers' Compensation Act (R. 7-12), and complaints were filed in the United States District Court for the Eastern District of Louisiana, New Orleans Division, to enjoin the awards and to have them annulled and set aside (R. 2-6), and on motion of the Deputy Commissioner the two cases were

consolidated because they involved common questions of law and fact (R. 12-13). The District Court (WRIGHT, D. J.) granted summary judgment on the motion of the Deputy Commissioner and dismissed the suits (R. 13-16, 85-6). No opinion was written by the District Court, but the judgment was based on two earlier decisions of the Circuit Court of Appeals for the 5th Circuit (R. 85).

An appeal was taken by petitioner (R. 86), and the two cases were consolidated for briefing and hearing by the appellate court, the record in only one of them to be printed (R. 1-2). The Court of Appeals for the 5th Circuit, in a two to one decision, affirmed the District Court, also following its two earlier decisions (R. 87-9). The Court of Appeals opinion is reported in 201 F. 2d 437.

II.

Jurisdiction.

These cases are under a federal statute, the Longshoremen's and Harbor Workers' Compensation Act, Section 3(a) being involved, 33 U. S. C. § 903, 44 Stat. 1426. The jurisdiction of this Court was invoked by a petition for a writ of certiorari to the Court of Appeals for the 5th Circuit, which petition was granted on June 8, 1953 (R. 92). 345 U. S. 974.

III.

Statement of the case.

The only questions involved in this matter are jurisdictional (questions of law), i. e., whether the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, or the Louisiana Workmen's Compensation Act, Title 23, Louisiana Revised Statutes, § 1021, *et seq.*, is applicable

to injuries, or death, of an employee working on a barge which has been hauled out of a river on the cradle of a marine railway and is at rest on land above high water some 350 feet from a river's edge.

The facts are simple and were either stipulated or uncontroverted (R. 21-7, 87, 201 F. 2d 438, note 2). Thus, there are no disputed facts which might affect the question of law presented.

On July 20, 1951, Arthur Campbell and Joseph D'Arensbourg, both employees of petitioner, were cleaning a barge at petitioner's marine repair yard at Avondale, Louisiana, when a flash explosion occurred, causing their deaths (R. 7-8, 21-3, 87). The barge, named Walter Russ, had been hauled out of the Mississippi River on a marine railway some hours before, and at the time of the accident was some distance from the water (R. 22, 87).

The widows of the two employees, on their own behalfs and on behalf of their respective minor children, filed claims for compensation under the Longshoremen's and Harbor Workers' Compensation Act (R. 7, 18, 28-30, 34, 87, 90-1) and, over petitioner's objections, awards were made by the Deputy Commissioner on both claims (R. 7, 11-14). Because the two claims involved identical facts, except for the names of decedents and the claimed beneficiaries, petitioner's complaints directed against the awards were consolidated for briefing and hearing on the record in only one case, the other to abide the final decision of this Court (R. 1-2, 90-1). Thus, the matter before this Court involves two separate claims which are identical in so far as the questions of law are involved.

The facts heretofore recited were stipulated, but in addition petitioner introduced the oral testimony of two witnesses with respect to the marine railway, which evidence has not been controverted. Henry Z. Carter, petitioner's general manager, testified that the marine railway at petitioner's repair yard had formerly been used as a

railroad ferry approach, but after petitioner's acquisition of the property it had been used for putting new construction into the water and removing vessels from the water for repair purposes (R. 47-8). The barge was in a position where the workmen could walk on the earth all around it, and no part of it or of the cradle on which it rested was overhanging the water (R. 52). The witness arrived at the scene of the accident about fifteen minutes after it occurred (R. 42), and he identified three photographs of the part of the marine railway on which the barge had been at rest at the time of the accident (R. 43-5). Reproductions of these photographs appear in the record on pages 84A, 84B, and 84C.

Mr. Arthur Grant, a mechanical engineer and a marine surveyor of experience, also testified without contradiction to the former use of the marine railway (R. 61-3) and the uses made of it by the petitioner (R. 64-5). He and Mr. Carter explained the difference between a marine railway and a drydock (R. 56-7, 66-9).

IV.

Specification of errors.

The Court of Appeals erred in the following respects:

1. In holding that the Longshoremen's and Harbor Workers' Compensation Act applies to an accident ashore on a marine railway regardless of whether the State of Louisiana could validly provide a recovery through compensation proceedings.

2. In holding that the Louisiana Workmen's Compensation Act, which expressly covers work on "vessels, boats and other water crafts", can not apply to the accident involved.

3. In holding that the Longshoremen's and Harbor Workers' Compensation Act determines the validity of state compensation Acts and their application to accidents ashore on a marine railway.

4. In misconstruing the express language of the Longshoremen's and Harbor Workers' Compensation Act, and holding that it extends the right to federal compensation to accidents ashore because it was within the power of Congress to do so.

5. In holding that Congress intended, contrary to its expressed intention and to the intention disclosed by the Act itself, to cover accidents ashore on marine railways.

6. In holding that a marine railway is a dry dock within the intent and meaning of the Longshoremen's and Harbor Workers' Compensation Act.

7. In sanctioning the Deputy Commissioner's assumption of jurisdiction, without statutory authority.

8. In taking property without due process of law.

ARGUMENT.

Summary of Argument.

In 1917, this Court held that a state compensation statute could not be applied to a stevedore's injury sustained on navigable waters. Subsequently, Congress made two attempts by legislation to make the state remedies applicable to such injuries; but that legislation was declared unconstitutional by this Court. Congress then enacted the Longshoremen's and Harbor Workers' Compensation Act (hereinafter called the Longshoremen's Act) to cover *only* those injured employees whom this Court had held could

not be provided for by state compensation laws. "Congress made clear its purpose to permit state compensation protection wherever possible." *Davis* v. *Department of Labor and Industries*, 317 U. S. 249, 252-3.

The Longshoremen's Act expressly covers *only if* disability or death results from an injury on navigable waters (including any dry dock), and *only if* recovery through workmen's compensation *may not* validly be provided by state law. The accident involved in the present case occurred 350 feet or more from any navigable water on a barge resting on a marine railway affixed to land above water level. The barge had not been floated to the place where it was on land, but had been pulled from the river by an engine ashore (R. 56-7), a method quite similar to having it bodily picked up by a huge crane and swung over onto the land.

The court below held (1) that a marine railway ashore above and away from any water is a dry dock within the intendment of the Longshoremen's Act, and (2) that Congress had the power to, and therefore did, provide for coverage of accidents on such a marine railway, to the exclusion of state workmen's compensation laws.

The fallacy in this reasoning is in assuming that Congress, contrary to its express language and to the holdings of this Court, intended to exercise unlimited power to create a federal jurisdiction, not given to it by the Constitution, which would oust the states of jurisdiction theretofore held by them. The court below also erred in holding that Congress intended by the words "including any dry dock" to mean also any marine railway, whereas Congress had shown by other legislation that it recognized a distinction between the two terms. In treating dry docks as on navigable water, Congress was merely following the decisions of this Court and others.

The Longshoremen's Act does not extend to accidents other than those which are within the exclusive admiralty

jurisdiction and therefore beyond the reach of the states, *Parker* v. *Motor Boat Sales*, 314 U. S. 244, and it left workmen's compensation remedies to the states wherever possible, *Davis* v. *Department of Labor and Industries, supra*, 317 U. S. 249. In *Swanson* v. *Marra Bros.*, 328 U. S. 1, this Court pointed out that the Act is restricted to injuries on navigable waters and "excludes from its own terms * * * any remedy against the employer for injuries inflicted ashore", leaving such cases to "the remedies afforded by the local law", and that it "permits recovery against the employer for injuries inflicted by land torts" under state compensation laws.

FIRST POINT.

The Louisiana Workmen's Compensation Act covers the accident, and the Longshoremen's Act did not oust the state of jurisdiction or assume jurisdition of accidents ashore.

As previously pointed out, there are no disputed facts in this case, and there is presented only questions of law involving the interpretation and application of § 3(a) of the Longshoremen's Act, 44 Stat. § 1426, 33 U. S. C. § 903(a), which provides:

> "Coverage. (a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but *only if* the disability or death results from an injury *occurring upon the navigable waters* of the United States (including any dry dock) and *if* recovery for the disability or death through workmen's compensation proceedings *may not validly* be provided by state law. * * *." (Italics supplied.)

The Longshoremen's Act was passed in 1927, but at that time there was in effect the Louisiana Workmen's

Compensation Act, Act 20 of 1914, § 1, 3 Dart's Statutes, § 4391(2), covering:

> "Every person performing services arising out of and incidental to his employment in the course of his employer's business or occupation in the following hazardous trades, businesses and occupations:
>
> "(a) The operation, construction, repair, removal, maintenance and demolition of railways and railroads, vessels, boats, and other water crafts,. . . ."

At the time of the accident involved the same coverage was contained in Title 23, Louisiana Revised Statutes of 1950, § 1035.

In 1917, while the Louisiana statute was in effect but before the Longshoremen's Act was passed, this Court held in *Southern Pacific Company* v. *Jensen*, 244 U. S. 205, 214-5, that an accident occurring on navigable water is within the admiralty and maritime jurisdiction and consequently within the paramount authority of Congress under Article III, § 2, of the Constitution. The course of federal legislation on the subject thereafter has been pointed out by this Court in the *Davis* case, *supra*, 317 U. S. at page 252, as follows:

> ". . . Congress on October 6, 1917, five months after the Jensen decision, passed an Act attempting to give such injured persons the 'rights and remedies under the workmen's compensation law of any State.' 40 Stat. 395, 28 U. S. C. A. §§ 41(3), 371(3). May 17, 1920, this Court declared the Act unconstitutional. Knickerbocker Ice Co. v. Stewart, 253 U. S. 149. June 10, 1922, 42 Stat. 634, 28 U. S. C. A. §§ 41(3), 371 (3), Congress made another effort to permit state compensation laws to protect these waterfront employees, but this second effort was also held invalid. State of Washington v. W. C. Dawson & Co., 264 U. S. 219. March 4, 1927, came the Federal Longshoremen's and Harbor Workers'

Act, 33 U. S. C. § 901 et seq. 33 U. S. C. A. § 901 et seq. Here again, however, *Congress made clear its purpose to permit state compensation protection whenever possible* by making the federal law applicable only 'if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.'" (Italics supplied.)

The coverage section of the Longshoremen's Act, § 3(a), expressly provides two conditions precedent, (1) the accident must have occurred on navigable water (including any dry dock), and (2) it must be one for which workmen's compensation recovery can not validly be provided by state law. Neither of these conditions precedent is present in the case before this Court.

The first officially reported case involving a marine railway and the Longshoremen's Act was *Colonna's Shipyard* v. *Lowe*, 22 F. 2d 843, decided in the Eastern District of Virginia in 1927, in which it was held that the Act is applicable only if compensation can not be provided by state law; and that a compensation remedy for an injury on a vessel which has been hauled out of the water onto the land by a marine railway can be provided by state law.

The next marine railway case was *Giske* v. *Austrem and Sandstrom*, decided by the Supreme Court of the State of Washington in 1931 but apparently reported only in 1931 American Maritime Cases 1200. There a man injured while painting a vessel on a marine railway brought an action at law against his employer, and the court granted a motion to strike out an allegation that plaintiff elected to sue under the Jones Act (46 U. S. C. § 688), saying:

> "If this injury had occurred while the vessel was in a floating dry dock, admiralty jurisdiction would attach (citing cases). And it is clear that jurisdiction would attach if the vessel were in a graving dock, for in such a dock the vessel is floated in, and

the water is merely temporarily withdrawn. Such a dock is within the ebb and flow of the tide.

"* * *

"The very reasoning of the learned judges in the *Butler* case negatives the jurisdiction of admiralty where water has not flowed and cannot flow. A vessel, on marine ways, is out of water, above reach of water, and has not been floated in place."

Next came *Continental Casualty Co.* v. *Lawson*, 2 F. Supp. 459, in the District Court of Florida in 1932, and *Vesta Coal Co.* v. *Norton* in a Pennsylvania District Court, but apparently unreported except as quoted in the appeal, *Norton* v. *Vesta Coal Co.*, 63 F. 2d 165. In the former case a marine railway was held to be included in the term "any dry dock" as used in the Longshoremen's Act. In the latter, the holding was to the contrary, that is, that an injury ashore on a marine railway was not within the Act as it would not be on navigable water and recovery could be provided by a state compensation statute.

The District Court holding in the *Norton* case was affirmed in January, 1933, in a 2-to-1 decision, the Circuit Court of Appeals for the 3rd Circuit saying, 63 F. 2d at page 166:

"* * * the contention is that Congress meant to include in the term 'dry dock' a marine railway. We cannot make such assumption or speculation. * * *. With these terms describing two different structures, it seems clear that, when Congress used the word 'dry dock,' it meant a dry dock in the common acceptation of the term, and did not intend to include any other thing. We rest on firm ground when we take Congress at its word. We enter into a field of speculation when we impute to Congress an intent to include something it did not say it included. The mention of one of a class is the exclusion of others."

The contrary decision of the Florida District Court in the *Lawson* case was approved by the Circuit Court of

Appeals for the 5th Circuit (in so far as the question here involved is concerned) in March, 1933, in a 2-to-1 decision, the majority opinion stating, 64 F. 2d 802, at pages 804-5:

> "It is within the power of Congress to extend to employees working on marine railways the same right to compensation for injury received in the course of their employment that it admittedly has provided for employees working on floating and graven dry docks. * * * State compensation laws and this compensation law of Congress are mutually exclusive of each other. The existence of the Act of 1927 must be taken into consideration and given effec in determining whether under Section 3 (33 U. S. C. A. Sec. 903) thereof the compensation laws of the states are valid and applicable; for state laws cannot now validly apply to a subject-matter over which Congress has exercised its exclusive jurisdiction. In our opinion it was not the intention of Congress to provide compensation for harbor workers only while they were working on ships that had been placed on floating or graven docks and to deny compensation if the same employees happened to be repairing a vessel on a marine railway. * * *. The use of the phrase 'including any dry dock' in section 3 discloses also an intention to exclude the ordinary cargo dock or wharf; to distinguish between the making of repairs to ships and the handling of cargo on shore; to assume jurisdiction over the former but not over the latter class of work. * * *."

It is our contention that the question is not whether Congress could have extended the Longshoremen's Act to cover injuries on marine railways, but rather whether it did so or even intended to do so; and this Court has agreed with that contention in subsequent decisions which we will refer to shortly. The Circuit Court of Appeals for the 4th Circuit said, in *United States Casualty Co.* v. *Taylor*, 64 F. 2d 521, 523-4, cert. den. 290 U. S. 639:

"We are not concerned with the power of Congress to include within the scheme of a federal compensation law the kind of employment involved in this case, unless it appears that it was the intention of Congress to cover it within the terms of the act * * *. Congress intended to occupy only a portion of the field (the crews of ships being excepted) from which the states are excluded, and to abstain altogether from duplicating the work of the states in the field which they are permitted to enter. * * *. It was the original policy of Congress to leave to the states, as far as possible, to provide compensation to workers for industrial accidents, and this policy has been continued in the present statute. It is noteworthy that by this course of action the requirement of uniformity in matters of admiralty and maritime jurisdiction is observed."

In *Crowell* v. *Benson*, 285 U. S. 22, 55, this Court said:

"In amending and revising the maritime law, the Congress can not reached beyond the constitutional limits which are inherent in the admiralty and maritime jurisdiction. Unless the injuries to which the act relates occur upon the navigable waters of the United States, they fall outside that jurisdiction."

In the *Lawson* case, *supra*, 64 F. 2d 802, the court conceded that the Longshoremen's Act and state compensation laws "are mutually exclusive of each other", but then proceeded to say that state laws could not apply to matters over which Congress had exercised its exclusive jurisdiction, and that it was not the intent of Congress to exclude from the Longshoremen's Act employees repairing a vessel on a marine railway, although it did intend to exclude stevedores on a pier alongside a vessel in navigable waters.

The majority opinion assumed an answer to the question for determination by stating that a state compensation statute would not apply to a matter over which Congress

had exercised its exclusive jurisdiction. The question is not what Congress could do, but what it intended and undertook to do. Congress did not state in the statute itself that it was exercising jurisdiction over accidents ashore on marine railways. Its intention and purpose in enacting the statute is disclosed in the Senate Committee report cited by this Court in *Parker* v. *Motor Boat Sales*, *supra*, 314 U. S. 244, at page 249.

This Court, on petition of the United States Attorney General, granted certiorari in the *Norton* case, *supra*, 63 F. 2d 165, which had held that accidents on marine railways were not covered by the Longshoremen's Act (290 U. S. 613); but in 1934 (subsequent to the decision of the court below in the *Lawson* case) the writ was dismissed, 291 U. S. 641, on a per curiam memorandum decision as follows:

> "As it appears that the Government has now adopted the conclusion that the decision below is correct and no substantial controversy is presented at the bar of this Court, the writ of certiorari herein is dismissed."

The Department of Justice thus appears to have come to the conclusion that an accident ashore on a marine railway was not covered by the Longshoremen's Act, disagreeing with the majority decision in the *Lawson* case, *supra*, 64 F. 2d 802.

In 1937 the Supreme Court of Washington held that the state compensation law applied to a workman injured on a gasboat which was on a marine railway track, having been hauled from the water for the purpose of repairs. *Rohlfs* v. *Department of Labor & Industries*, 190 Wash. 566. There the court said:

> "As above stated, it is the law that the same workman, while working alternately on a dock and on a ship attached thereto, varies the nature of his employment as he passes from the dock to the ship and

back again. While on the ship, he is within the maritime jurisdiction; while on the dock, he is under the jurisdiction of the state law."

In 1939 the court below, in *Maryland Casualty Co.* v. *Lawson*, 101 F. 2d 732, followed its decision in the earlier *Lawson* case.

Since the decisions in the *Lawson* (64 F. 2d 802 and 101 F. 2d 732), *Norton* (63 F. 2d 165), and *Rohlfs* (190 Wash. 566) cases, and the Government's concession (291 U. S. 641) that the *Norton* case decision was "correct", the purpose and coverage of the Longshoremen's Act has been passed upon by this Court in two important cases. In *Parker* v. *Motor Boat Sales* (1941), *supra*, 314 U. S. 244, there was involved an accidental death to an employee who was primarily hired as a janitor and porter ashore but was injured while on a boat in a navigable river. The Deputy Commissioner made an award under the Longshoremen's Act; the District Court dismissed a complaint to enjoin enforcement of the award; and the Circuit Court of Appeals for the 4th Circuit reversed. This Court reversed the Circuit Court of Appeals and affirmed the District Court holding that the accident was within the Longshoremen's Act because it occurred on navigable water within the federal admiralty and maritime jurisdiction, and said:

> "In the report of the Senate Committee on the Judiciary accompanying the bill which was enacted as the Longshoremen's and Harbor Workers' Compensation Act, S. R. 973, 69th Cong., 1st Sess. 16, this avowal of the Congressional purpose appears:
>
> "'If longshoremen could avail themselves of the benefits of State compensation laws, there would be no occasion for this legislation; but, unfortunately, they are excluded from these laws by reason of the character of their employment; and they are not only excluded but the Supreme Court has more than once held that Federal legislation

can not, constitutionally, be enacted that will apply State laws to this occupation. (Citing the *Jensen* and other cases.)

"* * *

"There can be no doubt that the purpose of the Act was to provide for federal compensation in the area which the specific decisions referred to placed beyond the reach of the states. *The proviso permitting recovery only where compensation 'may not validly be provided by State law' can not be read in a manner that would defeat this purpose.* * * *. "The main impetus for the Longshoremen's and Harbor Workers' Compensation Act was the need to *correct a gap* made plain by decisions of this Court. We believe that *there is only one interpretation* of the proviso in Section 3(a) *which would accord with the aim of Congress;* the field in which a state may not validly provide for compensation must be taken, for the purposes of the Act, as the same field which the Jensen line of decision excluded from state compensation laws. Without affirming or rejecting the *constitutional* implications of those cases, we accept them as the measure by which Congress intended to mark the scope of the Act they brought into existence." 314 U. S. 249-50. (Italics supplied.)

In *Davis* v. *Department of Labor and Industries* (1942), *supra*, 317 U. S. 249, this Court reversed a decision of the Supreme Court of Washington holding that the state compensation law did not apply to a structural steel worker who was drowned in a navigable river while working as an employee of a construction company in dismantling an abandoned draw bridge. The decedent had helped cut some of the steel from the bridge, which was placed on a barge to be moved away, and at the time of the accident was working on the barge examining the steel on it and, when necessary, cutting the pieces to proper lengths. The Washington statute expressly applied to all employees engaged in mari-

time occupations for whom no right or obligation existed under maritime laws. In holding the accident within the state compensation law, notwithstanding it occurred on navigable waters, this Court said:

> "A line of opinions of this Court beginning with Southern Pac. Co. v. Jensen * * * held that under some circumstances states could but under others could not, consistent with Article III, § 2, of the Federal Constitution, apply their compensation laws to maritime employees. State legislation was declared to be invalid only when it 'works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations.' * * *.
>
> "* * * March 4, 1927, came the Federal Longshoremen's and Harbor Workers' Act, * * *. Here again, however, *Congress made clear its purpose to permit state compensation protection whenever possible* by making the federal law applicable *only* 'if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law.'
>
> "Harbor workers and longshoremen employed 'in whole or in part, upon the navigable waters' are clearly protected by this Federal Act; but, employees such as decedent here occupy that shadowy area within which, at some undefined and undefinable point, state laws can validly provide compensation. * * *" 317 U. S. 252-3.
>
> "The Longshoremen's Act passed with specific reference to the Jensen rule, provided a partial solution. The Washington statute represents a state effort to clarify the situation. Both of these laws show clearly that neither was intended to encroach on the field occupied by the other. * * *. In our decision in Parker v. Motor Boat Sales, 314 U. S. 244, we held that Congress has by the Longshoremen's Act accepted the Jensen line of demarcation between state and federal jurisdiction." 317 U. S. 255-6.

"Under all the circumstances of this case we will rely on the presumption of constitutionality in favor of this State enactment; for any contrary decision results in our holding the Washington act unconstitutional as applied to this petitioner. A conclusion of unconstitutionality of a state statute cannot be rested on so hazardous a factual foundation here any more than in the other cases cited." 317 U. S. 258. (Italics supplied.)

In May, 1944, the court below decided *De Bardeleben Coal Corp.* v. *Henderson*, 142 F. 2d 481, which did not involve the issue presented in this case, as the accident happened on a barge in navigable water. However, after stating that "state compensation laws and this compensation law of Congress are mutually exclusive of each other", the court said:

"It is sufficient to say that Congress intended the compensation act to have a coverage co-extensive with the limits of its authority and that the provision 'if recovery * * * may not validly be provided by State law' was placed in the act not as a relinquishment of any part of the field which Congress could validly occupy but only to save the act from judicial condemnation, by making it clear that it did not intend to legislate beyond its constitutional powers. Having in mind the confused and confusing mass of quasi legislative decisions which, as such decisions always tend to do, had rendered the law almost hopelessly uncertain, this provision was inserted to avoid, not to provide, a new basis for further judicial trimming. In the application of the act, therefore, the broadest ground it permits of should be taken. No ground should be yielded to state jurisdiction in cases falling within the principles of the Jensen case merely because the Supreme Court, before the Federal Compensation Law went into effect, did here a little, there a little, chip and whittle Jensen down in the mass of conflicting and contradictory decisions in which it advanced and

> applied the 'local concern' doctrine to save to employees injured on navigable waters, and otherwise remediless, the remedies state compensation laws afforded them." pp. 483-4.

That case is not in point because the accident occurred on navigable water, but the court nevertheless referred to the statement in its majority opinion in the *Lawson* case, *supra*, (64 F. 2d 802) to the effect that Congress intended the Longshoremen's Act to cover any accidents which Congress had the power to provide for by a federal statute, notwithstanding this Court had said in *Parker* v. *Motor Boat Sales, supra* (314 U. S. at pages 249-50), that the Act was intended and should be interpreted to provide compensation *only* where the states could not; and in *Davis* v. *Department of Labor and Industries, supra* (317 U. S. at pages 252-3), this Court had said that the purpose of Congress was to *permit state compensation whenever possible.* In other words, this Court held that the state compensation statute would apply if it could, and the court below said a state compensation law could not apply if Congress *could* cover the matter by federal legislation. These are contradictory rulings.

Subsequently, and in 1946, this Court decided the case of *Swanson* v. *Marra Bros., supra*, 328 U. S. 1, which also is not directly in point because the question involved was the right of recovery of a longshoreman under the Jones Act. However, this Court clearly pointed out its interpretation of the Longshoremen's Act, in the following:

> "Congress enacted the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, 33 U. S. C. § 901, et seq., 33 U. S. C. A. § 901, et seq., which gave a remedy against employers by way of compensation for disability or death suffered on navigable waters by an employee not a 'master or member of a crew of any vessel.' * * *. By § 903(a)(1) recovery may be had under

the Act only 'if recovery for the disability or death through workmen's compensation proceedings may not be validly provided by State law.'

"* * *

"We can hardly suppose that Congress, while explicitly denying a right of recovery under the Jones Act to maritime workers not members of a crew who are injured on board a vessel, either thought that the Jones Act extended to injuries inflicted on shore to employees not members of a crew, * * * or intended that there should be established for such workers injured on shore, by extension of the doctrine of the Haverty case, a right of recovery which it at the same time withdrew from such workers when injured on navigable waters. The Senate Judiciary Committee, in recommending the legislation which became the Longshoremen's and Harbor Workers' Compensation Act, expressed *doubt as to the constitutional power of Congress to give recovery to such employees injured on shore*, saying 'These men are mainly employed in loading, unloading, refitting and repairing ships; but it should be remarked that injuries occurring in loading and unloading are not covered unless they occur on the ship or between the wharf and the ship, so as to bring them within the maritime jurisdiction of the United States.'– Sen. Rep. No. 973, 69th Cong. 1st Sess. p. 16. * * *.

"We must take it that the effect of these provisions of the Longshoremen's Act is to confine the benefits of the Jones Act to the members of the crew of a vessel plying in navigable waters and to substitute for the right of recovery recognized by the Haverty case only such rights to compensation as are given by the Longshoremen's Act. But *since this Act is restricted to compensation for injuries occurring on navigable waters, it excludes from its own terms* and from the Jones Act *any remedies against the employer for injuries inflicted on shore.* The Act leaves the injured employees in such cases to pursue the remedies afforded by the local law, which *this Court has often held permits recovery against the*

> *employer for injuries inflicted by land torts on his employees* who are not members of the crew of a vessel." 328 U. S. 6-7. (Italics supplied.)

As we understand the decisions in the *Parker* (314 U. S. 244), *Davis* (317 U. S. 249), and *Swanson* (328 U. S. 1) cases, *supra*, this Court does not consider the Longshoremen's Act as granting compensation remedies wherever Congress might have power to do so, but holds that it does not apply to any injuries ashore because state law can validly provide compensation relief; and that view is clearly disclosed by the expressed intention of Congress and the history of federal harbor workers' compensation legislation.

The intention of Congress to enact a federal compensation statute to cover only injuries to which the state compensation laws could not validly apply is disclosed by the Senate Committee Report No. 973 on Senate Bill 3170, 69th Cong., 1st Sess. (cited in the *Davis* case, *supra*, 317 U. S. at page 254, n. 4, and quoted in the *Parker* case, *supra*, 314 U. S. at page 249) as follows:

> "Section (3) of the bill describes the persons to be brought within its terms with such exceptions as are *necessary to limit* the operation of the bill to the very persons who are intended to be covered by it." (Italics supplied.)

As heretofore pointed out, Congress tried by earlier Acts to make state compensation statutes apply to all maritime workers, but those Acts were held unconstitutional because they sought to give the states authority to provide compensation in matters which are within the exclusive admiralty jurisdiction. As a result Congress enacted its own compensation Act to apply *only* to injuries of maritime workers which under the *Jensen* case, *supra*, 244 U. S. 205, and other decisions, had been held to be within the exclusive admiralty jurisdiction (excepting only seamen).

As clearly disclosed by the cited Senate Committee Report and the express language of the Longshoremen's Act, the purpose of that Act was to cover only injuries on navigable water which the Constitution would not allow the states to cover. However, the courts have held that many injuries on navigable water which are of mere "local concern," and which will not work material prejudice to the maritime law, are not within the exclusive admiralty jurisdiction and therefore state laws can be applied to them. *Grant Smith-Porter Ship Co.* v. *Rhode*, 257 U. S. 469; *Millers' Underwriters* v. *Braud*, 270 U. S. 59; *Parker* v. *Motor Boat Sales, supra*, 314 U. S. 244; *Davis* v. *Department of Labor and Industries, supra*, 317 U. S. 249; *Moore's Case*, 323 Mass. 162, aff'd. sub. nom. *Bethlehem Steel Co.* v. *Moore*, 335 U. S. 874; *Baskin* v. *Industrial Acc. Com.*, 97 Cal. App. 2d 257, aff'd. 340 U. S. 886.

This has given rise to a class of cases which come within what has been referred to as the "twilight zone" to denote injuries occurring on navigable waters for which the states may or may not afford compensation relief, depending on the particular facts of each case. This has lead to a great deal of confusion, as evidenced by the case of *Baskin* v. *Industrial Acc. Comm.*, 89 Cal. App. 2d 632, where a shipyard employee, whose work was ashore except when he was sent for short periods on ships being repaired, was injured when he was sent onto a ship in navigable waters and fell into a hold. The California State Compensation Commission dismissed an application for compensation, and a California court affirmed on the ground that the accident having occurred on navigable water was exclusively within the federal jurisdiction. Both a petition for rehearing and an application for a hearing in the State Supreme Court were denied. This Court granted certiorari and remanded the case to the California District Court of Appeals for reconsideration. 338 U. S. 854. The California court then reversed itself and annulled the com-

mission's order with directions to proceed with hearing and determining the claim. *Baskin* v. *Industrial Acc. Comm., supra*, 97 Cal. App. 2d 257. This last decision was affirmed in November, 1950, by this Court, without opinion. 340 U. S. 886.

The reversal, after remand by this Court, was based upon the decisions in the *Davis* case, *supra*, 317 U. S. 249, and in *Bethlehem Steel Co.* v. *Moore, supra*, 335 U. S. 874, affirming *Moore's* case, *supra*, 323 Mass. 162. *Moore's* case involved injuries sustained in a dry dock floating on navigable water and the court sustained an award of compensation under the state compensation statute. Both the *Moore* case and the *Baskin* case involved injuries occurring on navigable water, but they were considered within the "twilight zone" where the state was competent to give compensation relief.

The characterization "twilight zone" is applied to certain accidents on navigable waters, but *it has never been applied to personal injuries sustained ashore.* The Longshoremen's Act applies only to injuries "occurring upon the navigable waters" and only "if recovery * * * through workmen's compensation proceedings may not validly be provided by state law". Both of these conditions precedent are necessary to Longshoremen's Act coverage. As the Circuit Court of Appeals for the 1st Circuit said in *Royal Indemnity Co.* v. *Puerto Rico Cement Corp.*, 142 F. 2d 237, 238, cert. den. 323 U. S. 756:

> "The clause permitting recovery only where compensation 'may not validly be provided by state law' *is not an independent condition, but a limitation upon the previous clause referring to navigable waters,* necessary in view of the above decisions, and because not all injuries upon navigable waters are exclusively within federal jurisdiction (citing cases).
>
> "*Both clauses* must be read together and, *taken together they describe and limit the maritime field in which the Act was first made operative,* automatic-

> ally adjusting what the Supreme Court has referred to as the somewhat 'shadowy limits' of that field to any situation." (Italics supplied.)

In *New Amsterdam Cas. Co.* v. *McManigal*, 87 F. 2d 332, 333, the Circuit Court of Appeals for the 2nd Circuit said:

> "From the foregoing it is apparent that to come within the coverage of the statute the injured employee must satisfy three conditions:
>
> (1) In the course of his employment he must sustain injury upon the navigable waters of the United States; (2) his employment must be maritime; and (3) his injury must occur under circumstances which preclude state compensation laws from providing for recovery."

In the "twilight zone" cases one of the two necessary conditions is present, *i. e.*, a personal injury or death on navigable water (including any dry dock). But the Longshoremen's Act applies only if recovery "through workmen's compensation proceedings may not validly be provided by state law". If the injury occurs on navigable water (and a dry dock is on navigable water, *Gonsalves* v. *Morse Dry Dock Co.*, 266 U. S. 171; *Bethlehem Steel Co.* v. *Moore, supra*, 335 U. S. 874; *The Robert W. Parsons*, 191 U. S. 17, 33; *The Anglo-Patagonian*, 235 Fed. 92, 93-4), state laws may validly apply to it provided their doing so will not interfere with the general admiralty jurisdiction. *Davis* v. *Department of Labor and Industries, supra* (317 U. S. 249; *Baskin* v. *Industrial Acc. Comm., supra* (97 Cal. App. 2d 257; 340 U. S. 886); *Millers' Underwriters* v. *Braud, supra* (270 U. S. 59); *Moore's* case, *supra* (323 Mass. 162); *Grant Smith-Porter Co.* v. *Rohde, supra* (257 U. S. 469).

In the case at bar the deaths did not occur on navigable water nor on a dry dock, which is considered on navigable water. That they occurred on a barge is immaterial as

pointed out by this Court in *The Plymouth*, 3 Wall. (70 U. S.) 20, 35-6, and in *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52, 59-60:

> "The jurisdiction of the admiralty over maritime torts does not depend upon the wrong having been committed on board the vessel, but upon its having been committed upon the high seas or other navigable waters.
>
> "A trespass on board of a vessel, or by the vessel itself, above tide-water, when that was the limit of jurisdiction, was not of admiralty cognizance. The reason was, that it was not committed within the locality that gave the jurisdiction. The vessel itself was unimportant. * * * The jurisdiction of the admiralty does not depend upon the fact that the injury was inflicted by the vessel, but upon the locality—the high seas, or navigable waters where it occurred."

The Longshoremen's Act clearly excludes "any remedies against the employer for injuries inflicted on shore", and leaves the employee "to pursue the remedies afforded by the local law." *Swanson* v. *Marra Bros., supra*, 328 U. S. at page 7. Indeed, in *Crowell* v. *Benson, supra*, 285 U. S. at pages 55-6 this Court said:

> "Unless the injuries * * * occur upon the navigable waters * * * they fall outside that jurisdiction (admiralty). * * * the locality of the injury, that is, whether it has occurred upon the navigable waters of the United States, determines the existence of the Congressional power to create the liability prescribed by the statute (Longshoremen's Act). * * * If * * * the injury did not occur upon the navigable waters of the United States, there is no ground for an assertion that the person against whom the proceeding was directed could constitutionally be subjected, * * * to the liability which the statute creates." (Parenthetical words added.)

We submit that to follow the *Lawson* decisions of the court below (64 F. 2d 802 and 101. F. 2d 732), since which this Court has said in *Swanson* v. *Marra Bros., supra* (328 U. S. 1, 7), that the Longshoremen's Act excludes "injuries inflicted on shore", would be a clear overruling of this Court's interpretation of that Act, and merely add to the confusion in applying the Act. We believe that should be avoided to the end that the coverage section of the Act will be uniformly applied in the various circuits.

SECOND POINT.

A marine railway on land is not a dry dock.

In *Colonna's Shipyard* v. *Lowe, supra*, 22 F. 2d 843, and in *Giske* v. *Austrem and Sandstrom, supra*, 1931 A. M. C. 1200, it was held that state compensation laws would apply to accidents out of the water, on a marine railway. In the latter case, the court said:

> "The very reasoning of the learned judges in the Butler case negatives the jurisdiction of admiralty where water has not flowed and cannot flow. A vessel, on marine ways, is out of water, above reach of water, and has not been floated in place."

In Norton v. *Vesta Coal Co., supra*, 63 F. 2d 165, 166, the Circuit Court of Appeals for the 3rd Circuit held the same, saying:

> "* * * the contention is that Congress meant to include in the term 'dry dock' a marine railway. We can not make such assumption or speculation. * * * With these terms describing two different structures, it seems clear that, when Congress used the words 'dry dock,' it meant a dry dock in the common acceptation of the term, and did not intend to include any other thing. We rest on firm ground when we take Congress at its word. We enter into a

field of speculation when we impute to Congress an intent to include something it did not say it included. The mention of one of a class is the exclusion of others."

In *Rohlfs* v. *Department of Labor & Industries, supra,* 190 Wash. 566, the court held that the state compensation law applied to a workman injured on a boat on a marine railway track which had been hauled from the water for repairs, saying:

> "A marine railway, such as that upon which The Floyd was raised, runs from some distance in the water to any desired point on dry land. It is not like a floating dock or a dry dock into which a vessel which needs repair floats on the surface of the water. Upon a marine railway the boat is hauled, by some power other than its own and not connected with navigation, out of the water and to a point upon the land, where the boat remains until its future is determined by its owners. * * *
>
> "Respondent was working on land, not on the water; * * *."

However, the Circuit Court of Appeals for the 5th Circuit in *Continental Casualty Co.* v. *Lawson, supra,* 64 F. 2d 802, said:

> "The important question is whether the words 'any dry dock' are intended to include a marine railway. * * *" Page 804.
>
> "The use of the phrase 'including any dry dock' in Section 3 discloses also an intention to exclude the ordinary cargo dock or wharf; to distinguish between the making of repairs to ships and the handling of cargo on shore; to assume jurisdiction for the former but not over the latter class of work." Page 805.

And in *Maryland Casualty Co.* v. *Lawson, supra,* 101 F. 2d 732, 734, the same court said:

> "We entertain no doubt that in extending the law to cover 'any dry dock' Congress intended to include marine railways."

The Court of Appeals for the 9th Circuit followed this latter decision in *Western Boat Bldg. Co.* v. *O'Leary*, 198 F. 2d 409, 410-11, emphasizing the statement of the Court of Appeals for the 5th Circuit (101 F. 2d 734) that "it must be *presumed that Congress intended* to protect the great majority of laborers employed on floating docks and marine railways *as well as* the comparatively few workmen employed *on what are to be technically considered dry docks*". (Italics supplied.)

We most heartily take issue with the assertion that such an intent of Congress "must be presumed", when Congress included dry docks and omitted marine railways, and expressly confined the coverage to accidents on navigable waters which the states could not possibly provide for by compensation statutes. This Court has said that Congress made it clear (not a presumption) that it intended "to permit state compensation protection whenever possible." *Davis* v. *Department of Labor and Industries, supra*, 317 U. S., at pages 252-3. Such a clear expression negatives any presumption to the contrary.

Nowhere can an intention of Congress be found to include marine railways in the words "any dry dock", but such a presumption of intent would have to be based on a belief that Congress did not know the difference. However, that Congress has recognized a difference between a dry dock and a marine railway is clear from the Maritime Lien Law of 1920, 46 U. S. C. § 971, which provides:

> "Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel • • • shall have a maritime lien on the vessel • • •."

The lien statute deals with rights under maritime contracts within the admiralty jurisdiction, but when dealing with

non-contract matters in the Longshoremen's Act, Congress did not specify any "dry dock or marine railway". It limited the Act to dry docks, which were considered as on navigable water and within the admiralty and maritime jurisdiction. *Gonsalves* v. *Morse Dry Dock Co.*, *supra*, 266 U. S. 171; *The Robert W. Parsons*, *supra*, 191 U. S. 17, 33; *The Anglo-Patagonian*, *supra*, 235 Fed. 92, 93-4, and cases there cited. Prior to the Longshoremen's Act, accidents ashore were governed by state law, and Congress in passing the Act expressly excluded such accidents from its coverage.

The decision now under review merely followed and adopted the decisions of the same court in the *Lawson* cases, *supra*, (64 F. 2d 802 and 101 F. 2d 732). The underlying reason for the decisions in those cases appears to be that both dry docks and marine railways are used for the same purpose, *i. e.*, making repairs to vessels, and therefore Congress must have intended to include marine railways in the words "any dry dock". But that clearly was not the intention of Congress because it expressly provided that the Act covered *only* accidents on navigable waters which state compensation laws could not provide for, and vessels on dry docks (whether floating or graving) were held before the Act to be on navigable waters (see cases just cited). Vessels are floated into and out of dry docks, but a vessel can not be floated onto the land above high water mark, and it was never held until the *Lawson* cases that an accident on a vessel ashore above high water occurred on the water or was within the exclusive admiralty jurisdiction.

The fact that dry docks and marine railways are used for the same general purpose is beside the point except when dealing with maritime contract rights. Piers and lighters are both used to load and discharge vessels but it has uniformly been held that an accident to a stevedore on a lighter is within the admiralty jurisdiction, whereas an accident to the same stevedore on a pier is within the state jurisdiction. The

court below recognized that the Longshoremen's Act does not apply to accidents to stevedores handling cargo on a pier, but it attempted to distinguish between stevedores ashore and repairmen ashore. This Court, however, has never found any such distinction, and has consistently held that it is only those accidents which are within the admiralty and maritime jurisdiction that the states are prevented from providing for by compensation laws.

THIRD POINT.

The Deputy Commissioner's award is a taking of property without due process of law.

The Fifth Amendment to the Constitution provides that no person shall be "deprived of life, liberty, or property, without due process of law". The Deputy Commissioner would have no authority to make an award of compensation against this petitioner except through an express grant of such authority by Congress. If, as we understand and sincerely believe, the Longshoremen's Act did not give the Deputy Commissioner authority to make an award for death resulting from injuries occurring on land above high water, or where the state could give compensation protection, his award is a usurpation of authority and the taking of property without due process. *Crowell* v. *Benson, supra,* 285 U. S. at page 56. Until set aside, however, it can be enforced to take away petitioner's property.

Conclusion.

A marine railway is not a dry dock, even though used for similar purposes, and it was not included by Congress in the Longshoremen's Act as a place "upon the navigable waters". It cannot be presumed that Congress intended to cover injuries on a marine railway, contrary to the

language of the Act. A vessel on a marine railway on land is not in fact on navigable waters, and the states can validly provide compensation protection to those injured on it. An injury sustained on land is not within the exclusive admiralty and maritime jurisdiction of the Federal Government. The states can validly provide compensation for an injury or death ashore, by the express permission of Congress in the Longshoremen's Act. The Deputy Commissioner's taking jurisdiction and ordering compensation, without congressional authority, was a taking of property without due process of law.

Respectfully submitted,

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